



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2005

Mr. Alan D. Lathrom
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2005-05232

Dear Mr. Lathrom:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 225165.

The Town of Flower Mound (the "town"), which you represent, received two requests from the same law firm for information pertaining to the town's annexation of 5,044 acres of property, including voter lists and documents relating to the paving of a Durham road.¹ You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor argues that, on the basis of section 1205.064 of the Government Code, "[the town] has waived any objection it may have previously made to [the requestor's] request for public information." Chapter 1205 governs public security

¹You inform us that there is no Durham Road, but that you believe "the name of the road for which information is sought is Dunham Road and [we] have responded accordingly in this ruling request letter." We assume that the town has made a good-faith effort to relate the second request for information to the Dunham Road documents. *See* Open Records Decision Nos. 87 at 5 (1975) (governmental body must make a good faith effort to relate a request to information held by it). We also note that, pursuant to section 552.222 of the Government Code, a governmental body may ask a requestor to clarify a request for information if the request is unclear.

declaratory judgment actions, and section 1205.064(a) provides that “[e]ach record of an issuer relating to the public securities, a public security authorization, or an expenditure of money relating to the public securities is open to inspection at reasonable times to any party to an action under this chapter.” See Gov’t Code § 1205.021. The requestor notes, and the town acknowledges, that after the request for information was made, the town filed a bond validation cause of action, *Ex Parte Town of Flower Mound*, No. GN-501510 (98th Dist. Ct., Travis County, Tex. Apr. 29, 2005), pursuant to chapter 1205 of the Government Code.

We note, however, that section 1205.064 is a discovery provision as it pertains to the availability of certain kinds of information to parties to a specific type of legal proceeding. See *id.* §§ 1205.061-1205.069 (“Trial and Appeal Proceedings”). Chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. See *id.* §§ 552.005 (chapter 552 does not affect scope of civil discovery), 552.006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552). Moreover, we note that section 552.103(a) was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); Attorney General Opinion JM-1048 at 4 (1989); Open Records Decision No. 551 at 4-5 (1990) (purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures). Accordingly, we conclude that, whether or not the town was required to release some or all of the requested information to the requestor pursuant to section 1205.064 is not determinative of the town’s ability to raise section 552.103 of the Government Code to withhold the requested information.² We will therefore address this exception to disclosure.

Next, we note that the submitted information contains completed contracts that are subject to section 552.022 of the Government Code. Under section 552.022(a)(3), information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is expressly public unless it is expressly confidential under other law. You claim that this information is excepted under section 552.103 of the Government Code; however, section 552.103 is a discretionary exception to disclosure that protects the governmental body’s interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); see also Open Records Decision

²In this regard, we note the town informs us that the bond validation action has since been mutually dismissed by agreement of the parties and, further, that the documents it believes are subject to release under section 1205.064(a) “are ordinances adopted by the Town[,] and those ordinances are open to [the requestor] or anyone else who would like to review them.” We need not reach the issue of whether and to what extent the submitted information is subject to release under section 1205.064, except to note that the submitted information does not include the ordinances that the town states have been made available.

No. 522 (1989) (discretionary exceptions in general). As such, section 552.103 is not "other law" that makes information confidential for purposes of section 552.022. Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.103.

The town asserts that the remaining information is excepted under section 552.103, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The town has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The town must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us and provide documentation of the following: prior to the town's receipt of the requests for information, (1) the town was sued in the 362nd District Court of Denton County, (2) a plea to the jurisdiction was granted in favor of the town, (3) the plaintiffs have appealed the district court's determination to the Second District Court of Appeals, and (4) that appeal has not been resolved. We therefore agree that litigation was pending on the date the town received the request for information. Furthermore, having reviewed your arguments and representations, we find that the remaining information is related to the pending proceedings for purposes of section 552.103. Therefore, the town may generally withhold this information pursuant to section 552.103.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open

Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

To conclude, the town must release the marked information subject to section 552.022 of the Government Code. With the exception of any document that the opposing party to the pending litigation at issue has seen or had access, the town may withhold the remaining submitted information under section 552.103 of the Government Code. As our ruling is dispositive, we do not address your other argument against exception of the information at issue.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

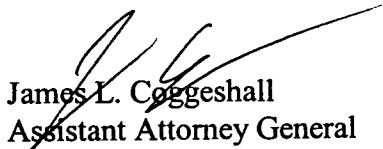
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 225165

Enc. Submitted documents

c: Mr. Robert J. Miklos
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(w/o enclosures)